93-54

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GLORIA KELLEY, EX-EMPLOYEE,
PETITIONER (PRO SE)

VS.

KIRKPATRICK & LOCKHART, a professional association consisting of partners engaged in the practice of law, BRIAN FOREMNY, Partner, Individually and as agent of KIRKPATRICK & LOCKHART, REGINA MARCH, Office Administrator, individually and as agent of KIRKPATRICK & LOCKHART, jointly and severally,

EX-EMPLOYER, Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GLORIA KELLEY, PRO SE
10564 S.W. 112 Avenue
Miami, Florida 33176
Tel. No. (305) 279-5785

Gloria Kelley

58 pp

QUESTIONS PRESENTED:

I

Can Two People Married to Different Spouses And Engaged in An Unprofessional Relationship With Each Other In The Workplace, And Acting Outside The Scope Of Their Employment, Hide Behind The "Employer Shield" To Violate My Rights As follows:

A) My Constitutional Right To Earn A Living;

B) My Constitutional Right Of Freedom Of Speech Exercised In Response To The Infliction Of Psychologically Abusive Behavior Upon Me;

C) My Right To Be Free from Discrimination Under The Americans With Disabilities Act of 1990 ("ADA")?

II

Can Respondents And Their Attorneys Seek Refuge Behind Bad-Faith Acts, Harassing Tactics and Sham Pleadings/Motions When Confronted With The Evidence Supporting The Truth And Substance Of The Matter?

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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM 1992

GLORIA KELLEY, EX-EMPLOYEE, Petitioner

vs.

KIRKPATRICK & LOCKHART, a professional association consisting of partners engaged in the practice of law, BRIAN FOREMNY, Partner, individually and as agent of KIRKPATRICK & LOCKHART, REGINA MARCH, Office Administrator, individually and as agent of KIRKPATRICK & LOCKHART, jointly and severally,

EX-EMPLOYER, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE 11TH CIRCUIT

I, ("Petitioner"), respectfully pray that a writ of certiorari issue to review the Order of Dismissal for failure to state a cause of action entered by the United States District Court on June 8, 1992. The dismissal is in conflict with several U.S. Supreme Court decisions as well as 11th Circuit Court of Appeals decisions and decisions of other

circuits.

OPINIONS BELOW

The opinions at issue are unreported.

JURISDICTION

This action was dismissed for failure to state a cause of action on June 8, 1992 (App. C, a13). The Court of Appeals affirmed the dismissal on March 30, 1993 (App. D, a15-a17). A timely Petition for rehearing was filed on April 7, 1993. The Court of Appeals denied the Petition for Rehearing on May 13, 1993 (App. E, a18-a19). This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C.A., Section 1983 (App. F, a20); American With Disabilities Act of 1990 (App. G, a21-a28), which is supported by Section 11-A of the Dade County Code, as Amended (App. H, a29-a33).

STATEMENT OF THE CASE

The U.S. District Court has jurisdiction pursuant to: violation of freedom of speech,

diversity jurisdiction, and violation of the Americans With Disabilities Act of 1990 ("ADA") which is supported by Section 11-A of the Dade County Code, as Amended.

I filed this case in the United States District court for the Southern District of Florida on October 10, 1991, after the attorneys acted in bad faith and refused to settle with me despite the fact that I provided them with all of my exhibits supporting my claim of discriminatory and retaliatory discharge.

I have been a legal secretary/paralegal for over fifteen (15) years. I am very familiar with the attorneys' harassing and dilatory tactics. I knew from the beginning that they were going to engage in these harassing and dilatory tactics to deny me access to the courts. Therefore, I fought their every attempt at obstructing justice by memorializing my entire case through my responses to their harassing motions. I could not afford to forget the details of the case through the passage of

time and fading memories.

On January 31, 1992, the Magistrate entered his order denying all my motions (App. A, a1-a3), and entered his Report and Recommendation to dismiss for failure to state a cause of action (App. B, a4-a12). On February 8, 1992, I filed my objections to the Report and Recommendation of the Magistrate. On June 8, 1992, the District Court issued its Order of Dismissal adopting and accepting the Magistrate's recommendation, overruling my objections (App. C, a13-a14).

On June 15, 1992, I timely filed my notice of appeal to the Court of Appeals of the 11th Circuit. I timely filed by brief on September 4, 1992. Appellants refused to respond to the brief. Instead they filed an "Initial Brief of Appellees" which repeated the contents of their motion to dismiss and bad-faith affidavit. The U.S. Court of Appeals for the 11th Circuit affirmed the dismissal on March 30, 1993 (App. D, a15-a17) and it denied a rehearing on May 13,

1993 (App E, a18-a19).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons: A) the questions presented are of exceptional importance; and B) the order of dismissal is in direct conflict with precedents of the Supreme Court and the Court of Appeals for the 11th Circuit and other Circuits.

I

I worked for Kirkpatrick & Lockhart ("K&L") from February 1987 to April 12, 1991. Regina March ("Regina") and Brian Foremny ("Brian") were married to different spouses, and they were involved in an unprofessional relationship with each other. Their relationship made the workplace a very hostile environment due to the power plays between them. I worked for Mark D. Cohen, an associate, and was later also assigned to work for Brian. Mark Cohen ("Mark") reacted with anger and resentment. He said that I was his secretary and I was being taken away from him. He then said "of course, since Brian is

her lover, she is going to make sure she takes care of him." The work situation became very strained. Additionally, the workload increased tremendously until it became apparent to both Mark and Brian that each one needed a full time secretary. Brian showed his resentment by telling me to bill the overtime to "administration because of the way this firm is run." I started to fall behind in my work. The hostile working environment combined with the excessive workload made me sick. I began having breathing difficulties to the point that I almost collapsed. I was diagnosed with a heart murmur and was put on medication.

When I received my performance review, I responded explaining why I was falling behind. Regina tore it up in front of me and told me that she was not going to put it in my personnel file. That's why I never signed her performance review. She then began to harass me by dumping more work on me. I was desperate. I needed my job because my husband was unemployed. I could

not understand why Regina was dumping more work on me since I had already been asking for help with my present workload. I then asked her why she was using me as her "punching bag." She was furious and that's when she used her illegitimate power obtained through her unprofessional relationship to pressure upper management to effect my dismissal; thus, violating my freedom of speech.

Both Regina and Brian told me that I was being dismissed because the job was too stressful for me and I had to take medication; thus violating the Americans with Disabilities Act of 1990 and Section 11-A of the Dade County Code which was in effect at the time of the dismissal.

Harvey Ziegler ("Harvey"), senior partner, and who has since left the firm, stood up for me. He told me that I was a "casualty of their affair." He did everything in his power to try to overturn the decision but was unsuccessful. He spoke to Jeffrey A. Tew ("Jeffrey"), managing

partner, who is also involved in an unprofessional relationship with his secretary, Joanne Brandt, for about 18 years. This fact was unbeknownst to Harvey. It is rumored that Joanne's son is Jeffrey's son.

Harvey also told me that he was told that in Florida employers can fire employees at will; thus, under the color of statute, they violated my constitutional right to earn a living in violation of the Civil Rights Act, 42 U.S.C.A. Sec. 1983. I had above average reviews and I was never reprimanded nor put on probation.

All of the foregoing is memorialized in the exhibits which I attached to the demand letter and to the Complaint, and in the entire record, including my motion for summary judgment filed with the Appeals Court. Such motion was denied.

II

I wanted to put this dispute behind me quickly. In the interest of judicial economy and in a good-faith attempt to settle out of court, I provided Respondents with all my

exhibits so that they could see that I had a legitimate claim. Respondents acted in bad faith, engaged in harassing tactics through their abuse of judicial process, and affixed their signature on sham pleadings/motions fully knowing that they were false and submitted in bad faith.

In Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the Supreme Court ruled that

> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of her claims which would entitle her to relief.

Furthermore:

> Exhibits attached to the pleadings will be considered part of the pleadings for purposes of deciding whether to dismiss or enter summary judgment. Fed Rules Civ. Pro. 12(b)(c), 56, U.S.C.A., First Chicago Corp. Securities Litigation, N.D. Ill., 1991 769 F. Supp. 1444.

Additionally:

> Rule that consideration of extraneous material causes a motion to dismiss to be translated into a motion for summary judgment is mandatory. Cortec Industries, Inc., v. Sum Holding L.P., C.A.2 (N.Y. 1991), 949 F.2d 42, cert. den. 112 S. Ct.

1561, 118 L.Ed.2D 208.

DIVERSITY JURISDICTION

The exhibits attached to the Complaint clearly show that diversity jurisdiction exists. Albert Conti ("Conti"), firmwide executive director lives in Pittsburgh and worked in the Pittsburgh office of Kirkpatrick & Lockhart, a Pittsburgh partnership. Conti traveled to Miami from Pittsburgh to "investigate" the matter. He ratified the dismissal.

Furthermore, Section 1558 Federal Practice & Procedure 32A Am Jur2d states that:

> the facts essential to support federal jurisdiction must appear somewhere in the record, diversity jurisdiction being upheld where the existence of diversity is affirmatively shown by the whole record (Emphasis supplied). Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d90; 94 S Ct. 1683, 71 Ohio Ops 2d 474, later app (CA6 Ohio) 570 F2d 563, cert den 435 US 924, 55 L Ed 517, 98 S Ct 1488; Sun Printing & Publishing Assoc v. Edwards, 194 US 377, 48 L.Ed 1027, 24 S Ct. 696; Robertson v. Cease, 97 US 646, 24 L. Ed. 1057.

AMERICANS WITH DISABILITIES ACT OF 1990

The exhibits further show that Appellees knew that the Americans With Disabilities Act

("ADA") had become law. In fact, the Washington office of Kirkpatrick & Lockhart analyzed the law in detail and requested that they get ready to comply with its provisions. The ADA became law in 1990. It is the provisions section of the law that Appellees are trying to use as refuge to circumvent the intent and substance of the law. Additionally, Chapter 11-A of the Dade County Code, As amended is the mirror reflection of the federal law and was in effect at the time of Appellees' malicious, discriminatory and retaliatory employment discharge.

FREEDOM OF SPEECH

This Court has jurisdiction under the stare decisis principle. The Supreme Court of the United States already ruled on the freedom of speech issue between private parties relative to employer/employee situation in Sheet Metal Workers International Ass'n v. Lynn, 1989, 109 S. Ct. 639. In this case, the employee was dismissed in retaliation for his speaking up against a raise in union dues. In my case, I

was fired in retaliation for my questioning Regina why she was being so abusive. I did not exercise my freedom of speech frivolously or disrespectfully. I exercised it because Regina's harassing tactics were driving me crazy and I desperately needed the job.

Furthermore:

> Where employee discharge complaint alleged, in good faith, constitutional violations and claim involved more than $10,000.00, requirements for federal jurisdiction were satisfied. U.S.C.A. Sacs. 701(b)(a)(d), 702, 7703(b)(1); 28 U.S.C.A. Sec. 1983. James Walker v. Walter F. Washington, 627 F2d 541 (1980).

THEREFORE, this court properly has jurisdiction, and the Court erred in dismissing this claim.

CONCLUSION

The workplace as its name implies, is a place to work. It is not a place to carry on extramarital or sexual affairs, especially when they violate employees' constitutional rights.

Furthermore, Respondents intentionally violated their oath to the Bar and further violated Rule 11 by engaging in harassing

tactics and refusing to comply with the Rule requiring the parties to meet to exchange documents and negotiate settlement. Respondents' attorney affixed his signature to the documents when he himself knew that I had been wronged and that Appellees had maliciously violated the law. The record evidences the harassing tactics and lack of professionalism.

IT IS TIME TO USE PUNITIVE/EXEMPLARY DAMAGES TO HELP THE HOMELESS, THE ABUSED CHILDREN AND THE RED CROSS. (Appendix I, a34-a35).

It is unconscionable that the very same people who swore to uphold justice are perpetrating injustice.

I respectfully reiterate my request to enter summary judgment as follows:

Punitive/exemplary damages in the amount of $21 million to be distributed as follows:

$7 million to Camillus House;

$7 million to Children First; and

$7 million to the Red Cross; and

compensatory damages to me in the amount of $1 million.

WHEREFORE, for the reasons set forth above, a writ of certiorari should issue to review the order of dismissal for failure to state a cause of action in this matter.

DATED: May 28, 1993.

Gloria Kelley, Pro Se
10564 S.W. 112 Avenue
Miami, FL 33176
(305) 279-5785

Gloria Kelley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-2271-CIV-NESBITT

GLORIA KELLEY,

Plaintiff,

VS.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court on the following pretrial matters in this case. Upon review of the motions identified below, all responses and replies thereto, the Court file and applicable law, it is hereby ORDERED AND ADJUDGED as follows:

a. Plaintiff's Motion to Strike Defendants' Motion to Dismiss the Complaint and Motion for Sanctions filed on October 29, 1991 is DENIED as MOOT by virtue of the filing of the amended complaint.

b. Plaintiff's Emergency Motion to

Expedite Discovery filed on October 29, 1991 is DENIED, the Court finding no basis for expedited discovery at this stage of the litigation.

c. Plaintiff's Renewed Motion to Strike Defendants' Motion to Dismiss the Complaint, Motion for Sanctions and Emergency Motion to Expedite Discovery filed on November 8, 1991 is DENIED for the above stated reasons.

d. Plaintiff's Third Renewed Motion to Strike Defendants' Motion to Dismiss the Amended Complaint and Motion for Sanctions filed on December 23, 1991 is DENIED, the Court finding Defendants' motion is neither redundant, immaterial, impertinent or scandalous as to warrant striking.

e. Plaintiff's Motion for Evidentiary Hearing filed on December 23, 1991 is DENIED, the Court finding the issues involved in this lawsuit do not necessitate an evidentiary

hearing at this time.

DONE AND ORDERED at Miami, Florida, this 31st day of January, 1992.

Ted E. Bandstra
U.S. Magistrate Judge

cc: Dennis A. Nowak, Esq.
Gloria Kelley, pro se

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF FLORIDA
CASE NO. 91-2271-CIV-NESBITT

GLORIA KELLEY

Plaintiff,

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., and REGINA MARCH, etc.,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on Defendants' Motion to Dismiss Amended Complaint filed on December 17, 1991.[1] Previously, this case was referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Lenore C. Nesbitt for the resolution of all pretrial

[1]The undersigned considers defendants' motion to dismiss the complaint filed on October 24, 1991 to be MOOT by virtue of the filing of an Amendment to Plaintiff's Complaint on December 11, 1991. Accordingly, this report and recommendation will not address that motion except to the extent that the grounds asserted therein are still relevant to the instant motion to dismiss.

matters pursuant to 28 U.S.C. 636(b). Having considered this motion, the court file and applicable law, the undersigned recommends that Defendants' Motion to Dismiss Amended Complaint be GRANTED for reasons explained more fully below.

INTRODUCTION

On October 10, 1991, plaintiff Gloria Kelley, proceeding pro se, commenced this employment discrimination action seeding damages against her former employer, Kirkpatrick & Lockhart, P.A. ("K & L"); Brian Foremny, a partner of K & L, and Regina March, the office administrator of K & L (collectively referred to as "defendants" herein) for, inter alia, alleged statutory and constitutional violations arising out of plaintiff's discharge from employment with K & L as a legal secretary. Specifically, plaintiff's original complaint asserts claims for discrimination under the Americans with Disabilities Act of 1990 ("ADA") (Count I), violation of constitutional right of freedom of

speech (Count II), intentional infliction of emotional distress (Count III), breach of implied contract (Count IV), damage to reputation (Count V) and ratification of discriminatory firing (Count VI).

On December 11, 1991, plaintiff filed a pleading captioned "Amendment to Plaintiff's Complaint" in which she purports to add the Florida state law claims of tort of retaliatory discharge (Count VII) and breach of duty (Count VIII) to her original complaint.

On December 17, 1991, defendants filed the instant motion to dismiss the amended complaint for failure to state a claim upon which relief may granted under federal or state law.

On January 27, 1991, defendants supplemented their motion with the filing of an additional memorandum of law in support thereof.

STANDARD OF REVIEW

Motions to Dismiss under Fed.R.Civ.P. 12(b) are addressed to the allegations of the complaint which must be liberally construed in

favor of plaintiff and accepted as true. *Jenkins v. McKeithen*, *395 U.S. 411, 421 (1969)*; Bracewell v. Nicholson Air Services, Inc., 680 F.2d 103, 104 (11th Cir. 1982); First American Bank & Trust By Levitt v. Frogel, 726 F. Supp. 1292, 1293 (S.D.Fla. 1989). Thus, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claims which would entitle her to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985).

CONCLUSIONS OF LAW

A. Discrimination under the Americans with Disabilities Act of 1990 (Count I)

Defendants move to dismiss plaintiff's claim for discriminatory firing under the ADA on the ground that this Act does not become effective until July 26, 1992 so that plaintiff cannot state a claim under the ADA for an alleged discriminatory firing which occurred on or about March 26, 1991. In addition,

defendants seeks dismissal of this discrimination claim for plaintiff's failure to exhaust her administrative remedies as required by the ADA and its enforcement procedures set forth in 42 U.S.C. Sec. 2000e-5.

The recently enacted Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12101 et seq. ("ADA") establishes a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" in the terms and conditions of their employment.[2] 42 U.S.C. Sec. 12101(b). The ADA applies to employers of twenty-five or more employees within industries affecting commerce. 42 U.S.C. Sec. 12111(5)(a). However, the ADA is inapplicable to plaintiff's discrimination claim because the enforcement provisions of the Act do not become effective until July 26, 1992. 42 U.S.C. Secs. 12111, 12117 and 12133; Pub. L.101-336, Title I, Sec.

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[2]Plaintiff's alleged disability appears to be a heart condition. See Complaint, Exhibit C.

108, 104 Stat. 337 (providing that the coverage section of the ADA is effective 24 months after July 26, 1990); see also, Moore v. Sun Bank of North Florida, N.A., 923 F.2d 1423, n.2 (11th Cir. 1991).

Accordingly, the undersigned finds that plaintiff's discrimination claim under the ADA (Count I) should be dismissed for failure to state a cause of action because the Act is currently unenforceable. Because the Act is not yet enforceable, the undersigned finds it unnecessary to address the issue of whether plaintiff has exhausted her administrative remedies under the Act.

B. Freedom of Speech Claim (Count II)

Defendants next move to dismiss Plaintiff's claim for violation of her constitutional right of freedom of speech (Count II) due to the absence of any state action under the circumstances of this case. Count II of the Amended Complaint alleges that plaintiff was discharged in retaliation for asking defendant

Regina March, "why she was using plaintiff as a punching bag." Cpt. para. 28. Defendants correctly note that even if this allegation was sufficient to demonstrate a restriction by defendants on plaintiff's speech, it is insufficient to support a cognizable cause of action against defendants since the First Amendment ordinarily prohibits governments, not private individuals, from abridging free speech. See NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) (first amendment prohibits governments from abridging free speech); R.C. Maxwell co. v. Borough of New Hope, 735 F.2d 85, 87 (3rd Cir. 1984) (first amendment considerations are not ordinarily implicated where private actors restrict speech). In fact, the first amendment has been held to guarantee private actors the right to make such restrictions. See R.C. Maxwell Co., at page 87, citing Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029.

Here, plaintiff's complaint is devoid of any allegations indicating that the government

played a role in defendants' decision to discharge plaintiff from K&L. Finding no authority requiring private individuals to respect other individuals' rights of free speech, the undersigned concludes that Count II should be dismissed for failure to state a claim against Defendants, a private law firm and two private individuals.

Conclusion

Having found that Counts I and II of plaintiff's amended complaint fail to state a cause of action, the undersigned further finds that this Court has been divested of its jurisdiction over plaintiff's remaining pendant state law claims. Accordingly, the undersigned finds it unnecessary to address these claims. In summary, the undersigned recommends that defendants' motion to dismiss the amended complaint be GRANTED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Lenore C. Nesbitt, United

States District Judge, within ten (10) days of receipt. See 28 U.S.C. Sec. 636(b)(a)(C); United States v. Warren, 687 F.2d 347 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); and Hardin v. Wainright, 678 F.2d 589 (5th Cir. Unit B 1982); See also Thomas v. Arn, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED in Miami, Florida, this 31st day of January, 1992.

Ted E. Bandstra
U.S. Magistrate Judge

Copies furnished to:

Honorable Lenore C. Nesbitt
Dennis A. Nowak, Esq.
Gloria Kelley, Esq .

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-2271-CIV-NESBITT

GLORIA KELLEY

Plaintiff,

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.

Defendants.
_____/

ORDER OF DISMISSAL

THIS CAUSE comes before the Court upon Report and Recommendation of Magistrate-Judge Ted E. Bandstra. After due consideration of the objections submitted by Plaintiff and the response to Plaintiff's objections submitted by Defendants, it is

ORDERED AND ADJUDGED that the Magistrate-Judge's Report and Recommendation of January 31, 1992 is AFFIRMED and Defendants' Motion to

Dismiss the Amended Complaint is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of June 1992.

Lenore C. Nesbitt
U.S. DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 92-4556
Non-Argument Calendar

D.C. Docket No. 91-2271-CIV-LCN

GLORIA KELLEY, Ex-employee,

Plaintiff-Appellant,

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before FAY, DUBINA, and BLACK, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Gloria Kelley appeals from the district court's order dismissing her complaint for failure to state a cause of action. We review the district court's order de novo in order to determine whether there exists any set of facts that would entitle Kelley to

relief.

Kelley was discharged from her secretarial position with Kirkpatrick & Lockhart, P.A., on April 12, 1991. In October 1991, Kelley filed a pro se complaint alleging discrimination under the American with Disabilities Act of 1990, unconstitutional violation of her freedom of speech, intentional infliction of emotional distress, breach of implied contract, damage to reputation, and ratification of discriminatory firing. A December 1991 amendment to the original complaint added state law claims of retaliatory discharge and breach of duty.

The district court adopted the magistrate judge's report and recommendation and granted the Defendants' motion to dismiss. The court determined that Kelley had not stated a cause of action on her federal claims, thereby divesting the district court of jurisdiction to hear her pendent state law claims. We agree. No set of facts exist that would entitle Kelley to relief. Kelley failed to state a cause of action, and

the pendent state law claims were properly dismissed. AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4556

GLORIA KELLEY, ex-employee,

Plaintiff-Appellant

vs.

KIRKPATRICK & LOCKHART, etc., BRIAN FOREMNY, etc., REGINA MARCH, etc.

Defendants-Appellee

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: FAY, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The Petition(s) for Rearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

FILED: May 13, 1993

Constitutional tort. Every person who under color of any statue, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. Sec. 1983.

BLACK's LAW DICTIONARY

KIRKPATRICK & LOCKHART -- EMPLOYMENT ISSUES
WINTER 1990-91

AMERICANS WITH DISABILITIES ACT: WHO IS DISABLED?

The Fall, 1990 **Employment issues** contained an insert in which we reviewed the Americans With Disabilities Act, outlining not only its employment provisions but also the other provisions of the Act. With this issue we begin a series of articles focusing on the employment aspect of the Act. The Act became law on July 26, 1990, and its employment provisions become applicable to employers with twenty-five or more employees on July 26, 1992. Six months have already elapsed, and the Act becomes effective approximately eighteen months from now. It is our hope that this series of articles will not only enable our readers to become familiar with the Act, but also encourage them to begin advance preparation for compliance with the Act, rather than waiting until the last moment.

Key to the Act is the definition of "disability": The term "disability" means with

respect to an individual -

- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

- a record of such an impairment; or

- being regard as having such an impairment.

A disability thus requires both an impairment and a substantial limitation on one or more major life activities as a result of the impairment.

The Senate and House reports clearly state that Congress used and relied upon the definition of the term disability contained in Section 504 of the Rehabilitation Act of 1973 and on the regulations issued under that legislation by the then Department of Health, Education, and Welfare ("Regulations"). It is also clear there is no definite and exhaustive list of disabilities, but rather each situation must be reviewed individually.

The Regulations define a physical

impairment as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: neurological; musculo skeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine." A mental impairment is "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

These definitions are broad, and are intended to be so. The House report on the Act contains a partial list of conditions considered as disabilities: orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; infection with the Human Immunodeficiency virus; cancer; heart disease; diabetes; mental retardation; mental illness; specific learning disabilities; drug addiction;

and alcoholism.

...if the applicant or employee can show something more than a trivial limitation, the burden will be on the employer to persuade a court that the disability does not affect a major life activity.

Although the list is long and very inclusive, it does not include very minor physical or mental limitation. There is a second part of the definition of disability which states that the impairment must substantially limit one or more of the individual's major life activities. The Regulations define major life activity as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities. Persons with minor impairments do not fit the definition. A person is considered as limited

when they are deficient in comparison to most people. Moreover, it is clear that the comparison must be made without regard to the availability of mitigating measures. Thus, a person who is hard of hearing is disabled even though the loss may be corrected through the use of a hearing aid.

Although the emphasis must be on the facts of each individual case, courts have held that mild cases of cross-eyedness, fear of heights,a chemical imbalance of lithium, and a back problem which did not preclude a person from acting over a period of many years as a mail carrier did not constitute a disability. Given the spirit and intent of the Act, however, it is certain that if the applicant or employee can show something more that a trivial limitation, the burden will be on the employer to persuade a court that the disability does not affect a major life activity.

An employer will not necessarily prevail in a charge of alleged disability discrimination

simply by showing that an applicant or employee does not have a disability. That result occurs because of two other parts of the definition of disability: a record of having had such an impairment OR being regarded as having such an impairment even if the impairment does not exist. Looking first at the issue of having a record of such impairment, this part of the definition protects those who have recovered from a physical or mental disability. Included are persons such as those with histories of mental or emotional illness, heart disease, or cancer. Other examples would be those who in the past have been misclassified as having an impairment such as having been classified as mentally retarded.

The third part of the definition, being regarded as having an impairment, in some cases overlaps the second, but whether failing under the second or third part of the definition, discrimination is prohibited. By way of example, a person who has a history of epilepsy

but had no seizure nor required medication for many years was held to be regarded as disabled. The third part of the definition was directed toward situations in which the attitudes and prejudices of others were considered. Thus, carrying the HIV or hepatitis B infection, or disfigurement from burns and scars, may not actually affect a major life activity but the prejudices of others may cause a perception of disability, and such persons are protected against discrimination.

Broad as the coverage and definition of disability may be, the Act specifically excludes from protection transvestites, homosexuals and bisexuals, others with certain sexual behavior disorders, compulsive gamblers, kleptomaniacs, pyromaniacs and persons with psycho active substance use disorders resulting from current illegal use of drugs. The issues of alcohol or drug addiction and use will be dealt with in more detail in a subsequent issue as they present specific problems and restrictions.

In summary, the Act's definition of disability is broad and very inclusive, and an employer risks litigation in any instance in which it does not hire or takes some other action or inaction against a person because of an actual or perceived mental or physical problem.

DADE COUNTY CODE SECTION 11A-2 (pgs. 280.28-30)

(Supp. No. 184)

(19) A handicapped person shall mean any individual possessing any physical or mental impairment which substantially limits one or more of that individual's major life activities, including:

(a)(i) Any person who has a record of such impairment, for example in such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, learning and working;

(ii) Any person who is perceived or regarded as having an impairment, or any person having a physical or mental impairment which does not substantially limit one or more major life activities but which is treated by another person as

constituting such a limitation, or a person having none of the impairments defined in this subsection but who is treated by another person as having such an impairment.

(b) Physical or mental impairment includes:

(i) Any physiological disorder, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory, including speech organs, cardiovascular, digestive, genitourinary, circulatory, skin, and endocrine;

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and

specific learning disabilities;

(iii) Any degree of paralysis, epilepsy, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness, speech impediment or persons who rely upon a Seeing Eye dog, wheelchair or other remedial method, appliance or device.

(c) A record of such impairment includes having a history of, or having been misclassified as having a history of physical or mental impairment which substantially limits one or more major life activities.

(21) Reasonable accommodation in employment shall require every employer to make necessary adaptations to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the adaptation

would impose an undue hardship on the operation of its program.

...

(b) In determining whether an accommodation would impose an undue hardship on the operation of an employer's program, factors to be considered include:

(1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) The nature and cost of the accommodation needed.

(c) An employer may not deny any employment opportunity to a qualified handicapped employee or applicant if

the basis for the denial is the need to make a reasonable accommodation to the physical or mental limitations of the employee or applicant.

JUSTICES AGREE TO STUDY LIMITS ON DAMAGE AWARDS

WASHINGTON (AP)

The Supreme Court said Monday it will restudy the constitutional limits on punitive-damage awards.

The justices, diving back into a national debate over skyrocketing jury awards in personal injury cases, agreed to study a West Virgina case in which an oil-and-gas business was ordered to pay $10 million in punitive damages.

The West Virginia Supreme Court ruled that the large award was justified because TXO Production Corp.'s conduct was "**really mean**."

Lawyers for TXO argued that the punitive damages -- 526 times higher than the $19,000 in compensatory damages awarded -- violated the company's constitutional right to due process.

The jury found that **TXO knowingly filed a frivolous lawsuit against another company as leverage** to increase its oil-and-gas rights on a tract of land in McDowell County. (Emphasis supplied) The Miami Herald, Miami, Florida (end of 1992?).[3]

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[3]I have a copy of the newspaper clipping.

CERTIFICATE OF INTERESTED PERSONS

In accordance with Part VII, Practice and Procedure, Rule 29, the following is a list naming all parent companies and subsidiaries: KIRKPATRICK & LOCKHART, a Pittsburgh partnership with offices in:

Boston, Massachusetts

Harrisburg, Pennsylvania

Washington, D.C., and

Miami, Florida[4]

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[4]A complete listing of the parties having an interest in this lawsuit is attached as "Certificate of Interested Persons, Page C-1 of 1" to Brief of Appellant, Gloria Kelley.